10505

(17,444.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 330.

FRITZ CONTZEN, APPELLANT,

vs.

THE UNITED STATES AND THE APACHE INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 26, 1899.

1 In the Court of Claims.

FRITZ CONTZEN
vs.
THE UNITED STATES. } No. 3358. Ind. Dep.

INDIAN DEPREDATION CLAIM. Filed July 18, 1891.—J. R.

I.—*Petition.*

Your petitioner respectfully represents:

That in the year 1861 he resided about three miles from the church of San Xavier del Bal, which was then about twelve miles above Tucson, in Arizona Territory. That he had his ranch stocked with several hundred head of cattle, some mules, some horses, and one blooded horse.

Your petitioner avers that in the spring or early summer of 1861 the United States troops, which had been stationed in the southern part of Arizona, and which gave protection to the settlers, were withdrawn, whereby the settlers became exposed to the depredation of Indians.

Your petitioner further avers that on October 20, 1861, a band of White Mountain Apache Indians raided the settlement at
2 San Xavier, and stole from the ranch of petitioner cattle, horses, and mules, the property of petitioner. That at the time said animals were stolen they were herded and carefully guarded in a strong corral, and the loss was not occasioned by any carelessness or negligence on the part of the petitioner or his employés.

Said Indians were not on their reservation, or any reservation, at the time of the raid; that petitioner took all usual precaution in guarding his live stock, but there was no reason to suppose that any Indians were near said ranch at the time of said raid.

That the property so stolen was as follows:

376 cows, at $25.00	$9,400 00
11 horses, at $50.00	550 00
3 mules, at $60.00	180 00
1 blooded horse	200 00
Total	$10,330 00

Your petitioner alleges that he has never recovered any of said stock, and has heretofore received no compensation for the losses in any form.

Your petitioner alleges that this claim was filed in the Indian Office, a Bureau of the Interior Department, on January 6, 1888, and was pending in said Interior Department on March 3, 1891.

Therefore your petitioner prays judgment against the United States for the sum of ten thousand three hundred and thirty dollars ($10,330). Your petitioner avers that no assignment of said claim,

or any part thereof, has been made. The said claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; that petitioner is a naturalized citizen of the United States, and has at all times borne true
3 allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

FRITZ CONTZEN,
By A. T. BRITTON, *Attorney.*

A. T. BRITTON, *Attorney.*

TERRITORY OF ARIZONA, } ss:
County of ——, }

Fritz Contzen, being first duly sworn, says that he is the claimant in the foregoing petition, and that all the statements of fact therein contained are true.

FRITZ CONTZEN.

Subscribed and sworn to before me, Brewster Cameron, clerk of the district court, 1st judicial district of Arizona, at Tucson, this 10th day of July, 1891.

[SEAL.]

BREWSTER CAMERON, *Clerk,*
By SANTIAGO AMSA,
Deputy Clerk.

Post-office address of claimant, Fritz Contzen, Tucson, Arizona; of attorney for claimant, A. T. Britton, No. 622 F St. N. W., Washington, D. C.

4 II.—*Motion to Amend Petition and Allowance of Same. Filed April 19, 1894.*

FRITZ CONTZEN
v.
THE UNITED STATES. } Ind. Dep. No. 3358.

1. Now comes the claimant, by his attorney, A. T. Britton, and moves the court that the style of the above suit be amended by adding the words and Apache Indians after the word States.

2. And that the petition in said case be further amended by adding, after the word "raid," in the second paragraph of the 2d page (as printed), the words, and the said Indians were in amity and under treaty relations with the United States on the date of the depredation.

A. T. BRITTON,
Attorney of Record.

J. W. DOUGLASS, *Counsel.*

April 19, 1894.
Allowed.

WILLIAM A. RICHARDSON,
Chief Justice.

5 III.—*Defendants' Plea to Jurisdiction. Filed December 6, 1897.*

FRITZ CONTZEN
v.
THE UNITED STATES ET AL. } No. 3358.

Defendants' plea.

Now comes the assistant attorney general and, after leave of the court first had and obtained, for plea to the declaration filed herein says that the claimant ought not to have and maintain his aforesaid action, because he was not at the date of the depredation therein alleged a citizen of the United States, and this court is therefore without jurisdiction to hear and determine the aforesaid cause.

And this the defendants are ready to verify.

JOHN G. THOMPSON,
Assistant Attorney General.

6 IV.—*Agreed Statement of Facts.*

FRITZ CONTZEN
v.
THE UNITED STATES ET AL. } No. 3358.

The claimant, Fritz Contzen, was born in Germany on the 27th day of February, 1831, and emigrated to Texas in July, 1845. He remained in Texas until the admission of the State into the Union, December 29, 1845.

Since the admission of Texas, the claimant has resided continuously in the United States, mostly in Arizona and some time in California. He visited Germany with his wife and child from 1873 to 1880, his home and furniture remaining all the time in this country. He was married in the United States. His residence was in Texas until he came to Arizona, in 1855, with Major Emory, on the boundary commission.

In the year 1854 he went into court at San Antonio, Texas, and he was told that he being a resident of Texas when it became part of the United States, that made him a citizen of the United States, and he voted there. He never took any further steps about naturalization. There is no record of naturalization from 1847 on of any one of the claimant's name, when such record should appear in the courts of San Antonio.

That in October, 1861, the defendant Indians were in amity with the United States.

JOHN G. THOMPSON,
Ass't Att'y Gen.

SMITH,
A. T. BRITTON,
Att'y for Claimant.

J. W. DOUGLASS, *Counsel.*

Ordered that this statement may be embraced in the record on appeal as the finding of facts.

BY THE COURT.

7 *Opinion of the Court.*

DAVIS, J., delivered the opinion of the court.

Defendants plead that plaintiff was not a citizen of the United States in 1861, when the alleged loss at the hands of Indians in Texas was sustained, and, therefore, the court is without jurisdiction to consider the case.

Plaintiff, a native of Germany, went to Texas in July, 1845, shortly before the admission of Texas as a State into the Union. He says he made a preliminary declaration of intent to become a citizen in San Antonio in 1854. No further evidence as to his naturalization is given, but evidence is introduced by the defendants tending to show the absence of any record of naturalization, from 1847 on, of any one of plaintiff's name in the courts of San Antonio, Tex., where such record should appear if it exist.

Plaintiff urges that by the admission of Texas to the Union, as he was then an "inhabitant" of the State, he became a citizen of the United States. When the State was admitted, December 29, 1845 (9 S. L., 108), plaintiff was not a citizen, but a German subject lately arrived in Texas. He was on that date physically an inhabitant of the State, but he was not a citizen of the State.

The constitution of Texas decrees: "All persons (Africans, the descendants of Africans, and Indians excepted) who were residing in Texas on the day of the declaration of independence shall be considered citizens of the Republic." (Sec. 10.) The date of the declaration of independence was March 2, 1836.

Plaintiff went to Texas in July, 1845, less than six months before December 29, 1845, the date when the State was admitted to the Union. At the date of this admission of the State, then, he was a German subject residing in Texas.

It is not to be assumed that Texas intended that through a general statute all aliens within their territorial jurisdiction should become citizens without the opportunity or right on their part to exercise any volition.

The statute purports to naturalize all inhabitants of Texas who were such March 2, 1836, the day of the declaration of independence. Plaintiff, however, was not then an inhabitant of Texas, as he first went there in July, 1845. It is incumbent upon plaintiff to prove affirmatively that he has been naturalized as a citizen of the United States. This he has not done, and the petition is dismissed.

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VI.—*Judgment of the Court.*

FRITZ CONTZEN
vs.
THE UNITED STATES and APACHE INDIANS. } No. 3358. Indian Depredation.

At a Court of Claims held in the city of Washington on the 31st day of May, 1898, it was ordered that the defendants' plea to the jurisdiction be sustained; and it was further ordered, adjudged, and decreed that the petition of the claimant be dismissed.

BY THE COURT.

VII.—*Application for and Allowance of Appeal.*

FRITZ CONTZEN
vs.
UNITED STATES and APACHE INDIANS. } No. 3358. Ind. Dep.

Now comes the claimant, by his attorney of record, and moves the court for the allowance of an appeal from the judgment of the said court in the above-stated case, entered May 31, 1898, to the Supreme Court of the United States.

A. T. BRITTON, *Att'y.*

JOHN W. DOUGLASS, *Counsel.*

Filed June 29, 1898.

And now, to wit, June 12, 1899, on motion of claimant's counsel, the appeal is allowed as prayed for.

BY THE COURT.

9

In the Court of Claims.

FRITZ CONTZEN
vs.
THE UNITED STATES and APACHE INDIANS. } No. 3358. Ind. Dep.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings, of the findings of fact, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington, D. C., this 19 day of June, A. D. 1899.

JOHN RANDOLPH,
Ass't Clerk, Ct. of Claims.

Endorsed on cover: File No. 17,444. Court of Claims. Term No., 330. Fritz Contzen, appellant, *vs.* The United States and The Apache Indians. Filed June 22nd, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

FRITZ CONTZEN,
APPELLANT,

v.

THE UNITED STATES AND THE APACHE INDIANS.

No. 84.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

STATEMENT.

Appellant's petition avers that he was a citizen of the United States in October, 1861, when a band of Apache Indians raided the settlement at San Xavier, near Tucson, Arizona Territory, and near where he then resided, and stole from petitioner's ranch certain cows, horses and mules of the value of $10,330, wherefor he prayed judgment. The United States plead in bar that claimant was not at the date of the depredation a citizen of the United States,

and sustaining this plea the Court of Claims has dismissed the petition for want of jurisdiction.

The agreed statement of facts, adopted by the Court below as its finding of facts, is as follows (R. 3):

"The claimant, Fritz Contzen, was born in Germany, "on the 27th day of February, 1831, and emigrated to "Texas in July, 1845. He remained in Texas until the "admission of the State into the Union, December 29, "1845.

"Since the admission of Texas, the claimant has resided "continuously in the United States, mostly in Arizona "and some time in California. He visited Germany with "his wife and child from 1873 to 1880, his home and fur-"niture remaining all the time in this country. He was "married in the United States. His residence was in "Texas until he came to Arizona, in 1855, with Major "Emory, on the boundary commission.

"In the year 1854 he went into court at San Antonio, "Texas, and he was told that he being a resident of Texas "when it became part of the United States, that made "him a citizen of the United States, and he voted there. "He never took any further steps about naturalization. "There is no record of naturalization from 1847 on of any "one of the claimant's name, when such record should "appear in the courts of San Antonio.

"That in October, 1861, the defendant Indians were in "amity with the United States."

Assignment of Errors.

1. In holding that appellant was not a citizen of the United States.

2. And in dismissing appellant's petition.

ARGUMENT.

I.

The record discloses a case of extreme hardship. Appellant has spent nearly all his life in the United States; has rested, since 1854, secure in the advice and conviction that he was a naturalized citizen thereof; has exercised the right of suffrage as such, and is now nearly seventy years old. The facts herein bear close analogy to those disclosed in *Boyd* v. *Thayer* (143 U. S. 135), where the Court observed (p. 179):

"The policy which sought the development of the "country by inviting to participation in all the rights, "privileges, and immunities of citizenship, those who "would engage in the labors and endure the trials of "frontier life, which has so vastly contributed to the "unexampled progress of the nation, justifies the appli- "cation of a liberal rather than a technical rule in the "solution of the question before us."

And, again (p. 169), the Court quotes with approval the language of the House Committee on Elections in the case of David Levy that—

"no principle has been more repeatedly announced by "the judicial tribunals of the country and more con- "stantly acted upon than that the leaning, in questions "of citizenship, should always be in favor of the claimant "of it. * * *"

II

In *Boyd* v. *Thayer* (*supra*) reasoning both on principle and authority, the Court further observes (p. 170):

"Congress having the power to deal with the people of "the Territories in view of the future States to be formed

" from them, there can be no doubt that in the admission
" of a State a collective naturalization may be effected in
" accordance with the intention of Congress and the
" people applying for admission.

"Admission on an equal footing with the original States
" in all respects whatever, involves equality of constitu-
" tional right and power, which cannot thereafterwards
" be controlled, and it also involves the adoption as citi-
" zens of the United States of those whom Congress
" makes members of the political community, and who
" are recognized as such in the formation of the new State
" with the consent of Congress."

These conclusions have equal application with respect to the admission of the Republic of Texas into the union of the States. The political *status* of an inhabitant in the former, and the legal effect thereon of his absorption into the United States and as a member of the community then residing in Texas at the date of the annexation thereof, are questions to be determined (1) in the light of precedents (2) guided by the liberal rule declared *supra*.

The Joint Resolution of March 1, 1845 (5 Stats., p. 798), declares the consent of Congress that the territory of the Republic of Texas " may be erected into a new State, to
" be called the State of Texas, with a Republican form of
" government, to be adopted by the PEOPLE of said Repub-
" lic by deputies in convention assembled, with the con-
" sent of the existing government, in order that the same
" may be admitted as one of the States of this Union."

The Congress of the Republic of Texas on July 4, 1845, declared :

" That the government of Texas doth consent that the
" *people* and territory of the Republic of Texas may be
" erected into a new State, to be called the State of Texas,
" with a Republican form of government to be adopted by
" the *people* of said Republic," etc.

Thereunder a Constitution was framed, and on October 13, 1845, ratified by popular vote, whereupon, on December 29, 1845 (9 Stats., p. 108), Congress adopted the Joint Resolution, which by way of preamble recited the acts of the *people* of Texas *supra*, and declared the admission of Texas as a State "on an equal footing with the original "States in all respects whatever."

When thus admitted appellant was residing in Texas and had been since the preceding July. As the findings, *supra*, recite:

"In the year 1854, he went into court at San Antonio, "Texas, and he was told that he being a resident of "Texas when it became a part of the United States, that "made him a citizen of the United States, *and he voted* "*there.*"

On this judicial assurance appellant has rested secure, until forty-four years thereafter (1898) when the court below rules *contra* declaring (Op. Rec. p. 4), that on the admission of Texas "he was on that date physically an "inhabitant of the State, but he was not a citizen of the "State."

This, we submit, is the application of a technical rather than a liberal rule, and the exact converse of this Court's humane declaration in *Boyd* v. *Thayer*, *supra*.

Nor does it otherwise stand fair judicial test. It was the people of Texas who were admitted into the Union of the States. The enabling and admission acts use the word "people," not the word "citizens." The word "people" is synonymous with the word "inhabitants." Defining the latter word in this connection, the Court, in *Desbois's Case* (2 Martin, 185) (quoted with approval in *Boyd* v. *Thayer*, *supra*), said:

"The word 'inhabitants' in the first section of this Act "(forming Louisiana) must be taken *lato sensu*; it can- "not be restrained so as to include citizens of the United "States only, for other persons are afterwards called upon "to vote. There is not any treaty, or other instrument, "which may be said to control it. *Every attempt to "restrict it must proceed on principles absolutely arbi- "trary.*"

In *American Insurance Co.* v. *Carter* (1 Pet. 511, 542), construing the word "inhabitants" in the treaty whereby we acquired Florida, the Court, speaking by Chief Justice Marshall, said:

"This treaty is the law of the land, and admits the "inhabitants of Florida to the enjoyment of the privileges, "rights, and immunities of the citizens of the United "States. It is unnecessary to inquire whether this is not "their condition, independent of stipulation. They do "not, however, participate in political power; they do "not share in the government until Florida shall become "a State."

Webster's Dictionary defines the word "People" thus:

"The body of persons who compose a community, tribe, "nation or race; an aggregate of individuals forming to- "gether a whole."

So in *Quinby* v. *Duneau* (4 Harr. (Del.) 383) it was held that "citizens" and "inhabitants" do not mean the same thing, as a man may be a citizen without being an inhabitant of a State or an inhabitant without being a citizen.

Tested by the same principle, the word "people" of the Republic of Texas, cannot be restricted to mean only "citizens" thereof. The former is of far broader significance. The "people" of Texas were about to be absorbed

into the Federal Union. Many were *not* citizens—for people of the African race and of even remote consanguinity were excluded from citizenship by the Constitution of Texas. They became citizens of the United States many years later by the Fourteenth Amendment. When Texas was admitted, appellant—a mere boy—was one of the community—the "people" of Texas. He came with the "people" into the Union. When he reached majority he sought to make certain his political status and was judicially advised that because he was a "resi-"dent" of Texas when that State was admitted "*that* "made him a citizen of the United States, *and he voted* "*there.*"

Whilst voting is *prima facie* evidence only of citizenship, we submit his acts *then and since* made a continuing declaration of appellant's intention to be and remain a citizen of the United States. That continuing declaration stands without a flaw. For some fifty-six years he has given constant demonstration of his belief and intention. To deny him now such political status under the circumstances disclosed by this record is to apply a harsh and technical rule rather than a liberal one, which under closely analogous facts this Court applied in *Boyd* v. *Thayer supra*, and to ignore the approved doctrine "that the "leaning, in questions of citizenship should always be in "favor of the claimant."

III.

In this relation of citizenship there are some principles which are imbedded in American jurisprudence, and which have been announced by the courts or may be deduced from their decisions which are to-day universally accepted. Among these are the following:

First. That every freeman has the *right of election* of citizenship (nationality). *Inglis* v. *Sailor's Snug Harbor* (3 Pet. 122) and cases cited; *McIlvaine's Lessee* v. *Cox* (4 Cranch, 212); *Boyd* v. *Nebraska, supra.* Legislative and Executive Declarations are to the same effect. Rev. Stats. U. S., sec. 1999, p. 351; Secretary of State Marcy, in the Koszta case (Wharton, Int. Law, vol. II, secs. 175, 198).

Opinions of Attorney General U. S., Vol. 9, p. 356.

The time, circumstance, and conditions under which this election should be manifested, are necessarily regulated by the laws and practice of the adopting, incorporating State; and the sufficiency of the proof of such election must be determined by reference to the implicated facts in each case as it arises.

Second. That the leaning in questions of citizenship (nationality) should always be in favor of the claimant of it.

Boyd v. *Nebraska, supra,* citing Yulee's Case, Contested Elections, 1834, 1835, 2d Session, 35th Congress.

Legislative Declaration asserting the right of expatriation, Rev. Stats. U. S., sec. 1999, p. 351.

Third. That upon the acquisition, cession, incorporation of a heretofore independent State into the American Union, the inhabitants—the people of such State—unless specially excluded or excepted by the terms of the treaty of cession or joint resolution of annexation, become *ipso facto* citizens (nationals) of the nation incoporating such State.

Boyd v. *Nebraska, supra,* citing with approval *Desbois' Case,* 2 Martin (Louisiana) p. 185, and *Laverty's Case,* 3 Martin (Louisiana) 735; *Story,* The Constitution, II, p. 654, 4th ed., note by Cooley.

This method of changing the citizenship (nationality) of inhabitants of acquired or annexed territory is termed "collective naturalization;" and the political history of the United States and other States furnish numerous instances of its operation.

Phillimore, Int. Law, p. 382; 2 *Gunther*, p. 268, note (e); *U. S.* v. *Ritchie*, 17 Howard, p. 541; *Paschall, Ann't's Constitution U. S.*, pp. 222–225; *Am. Ins. Co.* v. *Canter*, 1 Pet. 542, 543; *Sabariego* v. *McKinney*, 18 How. 263; 6 U. S. States L., Art. 3, p. 202; 10 Stats L., Art. 5, 1035.

Fourth. That under the American system, citizens (nationals) *lato sensu*, are naturally and usually divided into two general classes: (1) all the inhabitants (people) resident in the country, who are secured by the public, natural or fundamental law, the enjoyment of civil, personal and property rights; (2) a limited and privileged number, who, from reasons or motives of State policy or expediency, are clothed with political power, and exercise the elective franchise.

Scott v. Sandford, 19 Howard, and cases cited; *Miner* v. *Happersett*, 21 Wall. 162–8, and cases cited; *Murphy* v. *Ramsey*, 114 U. S. and cases cited, 15, 47.

The "protective rights" are secured to the first class as fully as the second.

"In so far as there is any analogy between Roman and "American citizenship, it is strictly applicable to us. "* * * It establishes the great *protective* rights of the "citizen, but, like our own National Constitution, it is "silent about his *powers*. It protected Paul against "oppression and outrage, but said nothing about his right "of suffrage or his eligibility to office."

Opinions of Attorneys-General, Vol. X, pp. 393–394.

Fifth. That the perpetual inhabitants (of a State) are

those who have received the right of perpetual residence. These are a kind of citizens of an inferior order, and are united and subject to the society without participating in all its advantages.

Marshall, C. J., in *The Venus*, 8 Cranch 290, citing Vattell.

If these principles are sound and are applied to the state of facts appearing in this record, the appellant was a citizen of the United States at the time of the depredations complained of, is presently a citizen of the United States, and as such citizen has standing in Court under the provisions of the Act of Congress of March 3, 1891.

IV.

The emigration of appellant from Germany to the Republic of Texas, where he established a permanent residence (domicile), conclusively establishes the fact of his abandonment of his native land for the land of his adoption.

" If it sufficiently appear that the intention of removing " was to make a permanent settlement, or for an indefinite " time, the right of domicile is acquired by a residence of " a few days." *The Venus* (8 Cranch, 278, 279); *Story, Conflict of Laws*, sec. 44, citing authorities; Wharton, Int. Law, II, sec. 198 *et seq; Kosciusko's case* (14 Howard, 400); *Mitchell* v. *U. S.* (21 Wall. 350).

If there was any doubt as to the intention of appellant in this regard, it is entirely removed by the circumstance that he went into the Texas Court with a view to be naturalized as a citizen of the United States, and was there informed by the constituted officials that such act was not necessary, as his residence in Texas at the time of its ad-

mission into the Union as a State in 1845, made him a citizen of the United States, and qualified him as a voter in the State if the other requisites for suffrage were satisfied. Upon this representation appellant voted. It results that appellant had not only long been a constituent member of the political community of Texas and of the United States, but was further one of that limited and privileged class enjoying the elective franchise. While it is true that the exercise of the elective franchise in purely State elections is not a conclusive test of American citizenship, it may be *prima facie* evidence of citizenship. In this case the facts are broad enough to indulge the presumption that appellant voted at both State and Federal elections.

In the State of Texas illegal voting is punished with fine and imprisonment. Pascall's Digest of the Laws of Texas, Arts. 1895, 1898, p. 419.

In the absence of proof to the contrary or strong incriminating circumstances, the Court will not presume that appellant has been guilty of felony. On the contrary, *omnia rite acta præsumuntur.*

V.

The joint resolution operating upon the Texas domicile of appellant made him a citizen of the United States as of the date of annexation.

March 1, 1845, 5 Stats. L., p. 797; December 29, 1845, 9 Stats. L., p. 108.

The contention here made on behalf of appellees is the same as was made in 1812 and in 1813, in the U. S. District Court for the District of Louisiana, and in the Supreme Court of Louisiana in Laverty's and Desbois's cases.

In those cases the attempt was made to fasten the bar of common-law alienage—which is foreign to American policy and practice—upon claimants to citizenship of the United States under circumstances similar to those in this case; but the contention was unsuccessful; and the reasoning and conclusions of these courts has recently been approved by this Court. Boyd *v.* Nebraska (*supra*).

The Act of March 3, 1891 (26 Stats L. 851, chap. 538), under provisions of which this action is brought, is remedial; and as such should not receive a narrow or strained interpretation.

Northwestern Ex. Co. v. *U. S.*, 164 U. S. 686, *et seq.*

It is as a member of the State that the individual becomes of consideration; and it is as such member that rights as also duties attach to him in his national character at home and in foreign territory. It is in this relation that the State has a special interest and concern in him; and its obligation to protect and his duty to render service is reciprocal. And it is a narrow and misleading view to attempt to exclude this State interest when discussing the relations, rights and duties of the individual.

When the claim of a particular individual to citizenship is denied, two things result: the individual is deprived of State membership and the protection incident thereto; and the State surrenders its claim to the allegiance of the particular individual.

Among the circumstances usually relied on to establish the *animus manendi* are: declarations of the party, the exercise of political rights, the payment of personal taxes, a house residence, and a place of business. *Phill. Int. Law*, 100; *Wharton* I, sec. 62, and post; *Mitchell* v. *U. S.*, 22 Wall. p. 138. All these *indicia* appear in the case of appellant.

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In conclusion, it is submitted, *First*, that appellant became a citizen of the United States as a result of the admission of Texas and its people into the American Union, appellant not being among the excepted or excluded classes; *Second*. That at the date of the depredations committed upon his property in October, 1861, he was a citizen of the United States; *Third*. That at the date of the filing of his petition he was a citizen of the United States; and, *Fourth*, that as such citizen the Court has jurisdiction of his claim under provisions of the act of Congress March 3, 1891. Appellant therefore prays that the judgment of the Court of Claims be reversed, with instructions to that Court to entertain the claim.

Respectfully submitted.

A. B. BROWNE.
J. W. DOUGLAS.
ALEX. BRITTON,
Attorneys for Appellant.

ALEXANDER PORTER MORSE,
Of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

FRITZ CONTZEN,
APPELLANT,

v.

THE UNITED STATES AND THE APACHE INDIANS.

No. 84.

Appeal from the Court of Claims.

REPLY BRIEF FOR APPELLANT.

I.

In our view, this case is not controlled by the law of individual naturalization, as accomplished by affirmative procedure on the part of an individual, under express statute. Collective naturalization—absorption *en masse* of the inhabitants of a community upon change of sovereignty, is in no way controlled or affected by the legislation of the new sovereign, which applies in individual cases and to emigrants coming from abroad. In respect

of collective naturalization, the reciprocal duty of allegiance to and protection from the new sovereign does not depend upon individual record declarations. The very instance cited upon opposing brief—the treaty of Guadalupe Hidalgo (9 Stats. 930), forcibly illustrates this contention.

By Article 8 thereof all Mexicans were permitted to make election, within one year, either to remain subjects of Mexico or to become citizens of the United States. Their election to become the latter, required no affirmative act, for the treaty expressly provided that—

"Those who shall remain in the said territory after the "expiration of that year, without having declared their "intention to retain the character of Mexicans, shall be "construed to have elected to become citizens of the "United States."

Silent acquiescence in the change of political sovereignty was all that was required, whereby thousands thus became citizens of the United States by this form of collective naturalization through this express treaty provision.

When, then, Texas was admitted to the Union in December, 1845, without express treaty or statutory provision in this regard, the same legal result necessarily attached. The Republic of Texas thereby ceased to exist. There was no retained sovereignty over any territory, and hence the people of the former Republic came into the Union as citizens thereof, excepting only those special classes who could not then become citizens, either of the Republic of Texas or the succeeding sovereign—the United States—such as slaves or Indians. Appellant was not of these excluded classes. He was then a resident of Texas.

Between the date of his arrival in that Republic (July, 1845), and the admission of Texas into the Union (Decem-

ber, 1845), he was a minor, and hence incapable of making a formal declaration of intention under the Texas law. This the opposing brief concedes, but he continued to reside in Texas until after he had attained his majority, giving thereby the most definite declaration of intention of permanent change of domicile.

On arrival at majority in 1854, he sought individual naturalization, and went into the Court for that purpose, and being there informed that because he was a resident of Texas in 1845, when the State was admitted into the Union, he became thereby a citizen of the United States, *he was allowed to vote.*

Opposing counsel insist that the findings do not authorize the presumption that he was so informed judicially on his application for individual naturalization, because, it is insisted, no judicial record of the transaction is presented. The obvious answer is that any record of such occurrence would naturally not be preserved. Any one familiar with the practical method of applying for admission to citizenship knows that such application is made orally at the bar, and after examination by the Judge is admitted or denied, according to the facts developed and the Court's ruling thereon. In event of denial there is no occasion for any record. That is made only where the application is allowed, and thereafter stands as a judicial record of the fact of such allowance. It would be unjust in the extreme to here rule that because the appellant does not produce the record of his non-naturalization, that hence the presumption should be indudged that the Court to whom he applied did not judicially act thereon. In fairness, the presumption should be all the other way.

II.

It is equally plain that by such collective naturalization, whether accomplished under treaty or statute, whereby the inhabitants of the ceded country are admitted to citizenship, there would be no affirmative acceptance on the part of the new sovereign. The adjudicated cases, and the law writers cited under this head by opposing counsel, deal only with cases of individual, and not collective naturalization. They are, hence, without proper application here.

It is in no sense an unwarrantable assumption to say that the appellant came to Texas and resided there with the intention of becoming a citizen of that Republic. The finding is that he continued to reside there "until he "came to Arizona in 1855, with Major Emory, on the "boundary commission." His continued acts abundantly declare his continuing and uniform intention. He was not a "tourist within its borders" or of excluded African or Indian blood. We still insist that the Laverty and Dubois (Louisiana) cases cited on our former brief are applicable here.

Nor is it correct to say that in *Boyd* v. *Thayer* (143 U. S. 135) the majority opinion rested only upon the assumption that the declaration or naturalization of the father of Boyd created citizenship in his son. Even on that point, the case was not ruled by four only of the Justices, as counsel erroneously assume, but by a majority of the Court. And all of the justices, with one exception, united in concurring with the conclusion adopted by the Court in its second line of reasoning, wherein (page 180), in speaking of individual naturalization, it was aptly observed:

"It is true that naturalization under the acts of Con-
" gress known as the naturalization laws can only be
" completed before a court, and that the usual proof of
" naturalization is a copy of the record of the court. But
" it is equally true that where no record of naturalization
" can be produced, evidence that a person, having the
" requisite qualifications to become a citizen, did in fact
" and for a long time vote and hold office and exercise
" rights belonging to citizens, is sufficient to warrant a
" jury in inferring that he had been duly naturalized as a
" citizen. *Blight* v. *Rochester*, 7 Wheat. 535, 546; *Hogan*
" v. *Kurtz*, 94 U. S. 773, 778. And by the Constitution
" of Ohio of 1851, none but white male citizens were
" entitled to vote, or to hold office."

Such was also the law of Texas. Sayles' Civil Code of Texas, Vol. 1, page 541, Chap. 4, Art. 1888—Title "Suf-
" rage;" and as cited in the former brief, illegal voting in Texas is punishable with fine and imprisonment.

In *Caddik* v. *Pavik* (83 Northwestern Reporter, p. 5, N. Dak.) it was ruled that proof of voting overcomes the presumption of alienage and raises the presumption of naturalization, as the law will not presume that the party committed an unlawful act. The rule is reaffirmed in *People ex rel. Smith et al.*, 27 New York 45.

III.

Johnson v. *The United States and Ute Indians* (160 U. S. 546), cited against us, is not a case in point. There the appellant admitted upon the record that he was *not* a citizen of the United States when the Indian depredation was committed. And the question raised and ruled was whether his subsequent admission to citizenship brought his claim within the act conferring jurisdiction upon the Court of Claims to adjudicate this class of cases. The

suggestion of counsel in connection with the citation of this case, that there are many similar cases found in the Court of Claims, wherein the argument based on domicile or continued residence would apply with equal force is, of course, wholly outside of this record. It cannot affect the legal conclusion here, but it can with propriety be suggested that the citation of *Johnson* v. *United States*, as illustrating the character of such cases, is not a happy illustration in respect to its application to the case at bar.

IV.

We do not concede the opposing contention that the presumption may be here indulged against the appellant because the United States is defendant. *Contra*, where by settled authority and innate principle, presumption leans in favor of the claimant for citizenship, in respect to his exercise of political rights, the same principle and the same presumption must have equal force where protection of his property is involved. In a court of justice, it has long been ruled that the United States stands upon the same footing as a private suitor; bound by the same rules of pleading, evidence, and practice. The principle is clearly expressed by Mr. Justice Field, in *United States* v. *Flint* (4th Sawyer, 42, 58), thus:

"The United States, by virtue of their sovereign char-
" acter, may claim exemption from legal proceeding; but
" when they enter the courts of the country as a litigant,
" they waive this exemption and stand on the same foot-
" ing with private individuals."

V.

In discussing provisions of the Fourteenth Amendment it has been said:

"The word citizen is employed in the law in different "senses under different circumstances. As generally "employed, however, it may be said to mean *a person* "*owing allegiance to the Government and entitled to pro-* "*tection* from it. Such, doubtless, is the meaning of the "word as here used. It therefore includes females as "well as males, *minors as well as adults*, those who do "not, as well as those who do, possess the privilege of "the elective franchise." Story, Constitution, LL. p. 654; see note by Cooley.

In reference to the effects of the annexation of foreign territory, where no excluding clauses intervene, it is said:

"*Persons* brought in by annexation of foreign territory "are not regarded as aliens, but as citizens. So it was "decided in the case of Mr. Yulee, chosen a member of "Congress from Florida; and this ruling has been acted "upon since as clearly and unquestionably correct." Story, *supra.*

The suggestion of opposing brief that appellant's "rov- "ing disposition" discloses the lack of intention to acquire domicile, is in no manner justified by this record. The findings show that appellant was born in February, 1831. He is now, therefore, nearly seventy years old. He remained in Texas from July, 1845, until he came to Arizona in 1855 on the Boundary Commission.

The finding is that since the admission of Texas "the "claimant has resided continuously in the United States, "mostly in Arizona and sometime in California. He "*visited* Germany with his wife and child from 1873 to "1880, his home and furniture remaining all the time in "this country. He was married in the United States." The fact remains that for some fifty-six years he has resided in the United States, with the brief absence noted in the visit to his fatherland. There is nothing in the

findings to otherwise justify the suggestion that he was or is a rover, and hence, by natural instinct, incapable of acquiring a domicile. Beyond all question he is shown to have been a *bona fide* resident of the United States for over fifty-five years. Coming as a lad to Texas, and remaining in the land of his adoption ever since, no violence is done judicial authority, nor the opinions of learned writers on the civic status by ruling him to be in law, what, since 1854, he has believed himself to be in fact—a citizen of the United States. Certainly upon this record Germany would not regard him as a citizen of that Empire, nor interpose for the protection of his personal or property rights.

Respectfully submitted.

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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

FRITZ CONTZEN, APPELLANT,
v.
THE UNITED STATES AND THE APACHE INDIANS. } No. 84.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

STATEMENT.

This was a suit brought under the Indian depredation act of March 3, 1891, for the recovery of $10,330, the value of certain property alleged to have been taken from the appellant (the claimant below) by the Apache Indians in October, 1861. The defendants filed a plea to the jurisdiction of the court, alleging that the claimant was not at the time of the depredation a citizen of the United States. The court sustained the plea and dismissed the

petition. From this decision the claimant appealed. The sole question here presented is whether the appellant was a citizen of the United States on the date named.

The following is the agreed statement of facts:

> The claimant, Fritz Contzen, was born in Germany on the 27th day of February, 1831, and emigrated to Texas in July, 1845. He remained in Texas until the admission of the State into the Union, December 29, 1845.
>
> Since the admission of Texas the claimant has resided continuously in the United States, mostly in Arizona and some time in California. He visited Germany with his wife and child from 1873 to 1880, his home and furniture remaining all the time in this country. He was married in the United States. His residence was in Texas until he came to Arizona in 1855 with Major Emory, on the boundary commission.
>
> In the year 1854 he went into court at San Antonio, Tex., and he was told that he being a resident of Texas when it became part of the United States, that made him a citizen of the United States, and he voted there. He never took any further steps about naturalization. There is no record of naturalization from 1847 or of anyone of the claimant's name, when such record should appear in the courts of San Antonio.
>
> That in October, 1861, the defendant Indians were in amity with the United States.

ARGUMENT.

The question is whether Fritz Contzen was a citizen of the United States in 1861. It is admitted that he was born in Germany; that he came to Texas in July, 1845, and that he was not naturalized under the statutory pro-

visions prior to 1861. His sole claim to citizenship is based upon the collective naturalization effected by the admission of Texas into the Union. The inquiry is really, therefore, whether Contzen became a citizen on the day when the Republic of Texas became a constituent part of the United States.

The act of Congress proposing to receive Texas as a State was approved on March 1, 1845; the Congress of the Republic of Texas accepted the terms of that proposal in June, 1845; a convention called for the purpose adopted a State constitution in August, 1845; and on December 29, 1845, the President of the United States approved a joint resolution of Congress reciting the above facts and declaring that the State of Texas thereby became one of the States of the Union. The latter date was the true date of admission. (*Culkin* v. *Cocke*, 14 Howard, 227.)

In these resolutions and acts of the respective Governments, there is nowhere any express stipulation in regard to the question of citizenship, which is, therefore, relegated for decision to the general principles of international law. Now, it is elementary that when a sovereign state, or a part of one, becomes a part of another sovereign state, by conquest or otherwise, there is a transfer allegiance or citizenship, contemporaneous with the transfer of territory. This change is a transfer of allegiance on the part of a subject, or citizen; on the part of the Governments involved, it is a transfer of sovereignty. The two are reciprocal and mutual. Under modern principles of law, a change of status can not be made without the consent of both parties to the transaction.

The allegiance of the individual is not to be transferred from one sovereign to another except by his own consent and by his own acts; and, conversely, the sovereignty of any power is not to be extended to cover any individual without the consent and authority of the sovereign. These principles are applicable both to the inhabitants of ceded or conquered territory and to immigrants.

> The right to acquire a domicile in an adopted country may be regarded as one of the most valuable additions to modern international law. The consequence of the acquisition of such domicile is the loss by the abandoned country of all title to tax personally, or to exact either civil or military obedience. But this change of relations can not be effected, as Bar justly argues, by the emigrant's single will. He must be accepted as a resident in the country in which he settles. He must acquire, not merely a domicile, but be granted an asylum in such country. (Wharton, Conflict of Laws, sec. 75.)

In *Elk* v. *Wilkins* (112 U. S., 94, 99) it is said by the court that:

> Though the plaintiff alleges that he "had fully and completely surrendered himself to the jurisdiction of the United States," he does not allege that the United States *accepted his surrender*, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen by the State or by the United States.

And quoting from the opinion of Chief Justice Taney in *Scott* v. *Sanford*, to the effect that an Indian who should leave his tribe and take up his abode among the white population would be entitled to all the rights and

privileges which would belong to an immigrant from any other foreign State; the court says further (p. 101):

> But the emigrant from any foreign State can not become a citizen of the United States without a formal renunciation of his old allegiance and an acceptance by the United States of that renunciation through such form of naturalization as may be required by law.

In case where territory is transferred, the consent of the individual to a change of allegiance may be manifested, in the absence of treaty stipulation or statute law, by remaining in the country after the change of sovereignty. But the new government may establish any conditions which it may desire and prescribe any forms which it may deem necessary, in accordance with which the claimant's election must be made manifest. For example, in the transfer of territory from Mexico to the United States by the treaty of Guadalupe Hidalgo, those who desired to remain citizens of Mexico were obliged to record their election under certain specified forms (9 Stat. L., 930).

As firmly established as the foregoing is the principle that (still in the absence of treaty stipulation) inhabitants of the ceded territory are received into the new sovereignty with the same status which they enjoyed under their former sovereign, so far as this is possible under the respective forms of government. It is strongly implied by Vattel that the rights of citizens in conquered territory extend even to the same participation in the general government that they enjoyed before the conquest, provided the nature of the two governments are the same. (Vattel, Law of Nations, Book 3, sec. 199.)

A striking example of the application of this necessary and logical principle is found in the very act of annexation which is under consideration. There were in Texas, exclusive of all who owed allegiance to foreign governments, at least three classes of inhabitants. After the annexation these classes maintained, respectively, the same relation to the Government of the United States which they had previously borne to the Republic of Texas. The citizens of Texas became citizens of the United States; the slaves remained slaves; and the Indians, who, though resident inhabitants, free, and not owing allegiance to any foreign power, were yet not citizens of Texas, continued to hold the same anomalous relation to the new government.

CONTZEN WAS NOT A CITIZEN OF TEXAS AND, THEREFORE, DID NOT BECOME A CITIZEN OF THE UNITED STATES.

The application of this principle to the case in hand requires an answer to the question, Was Contzen a citizen of the Republic of Texas? If he was, then, there being no stipulation between the two republics in regard to the status of the inhabitants, the general principal would prevail and he would become a citizen of the United States.

If there had been no test provided by the statutory law, by which to ascertain whether one was at a given time a citizen of the Republic of Texas, then it would be necessary to inquire concerning the domicile of the claimant to citizenship, the length of his residence, the *animus memendi*, and the evidences of renunciation of

former allegiance. But in the Republic of Texas, as in the United States, there were express provisions by which citizenship was defined and limited.

At the time of Contzen's immigration, and up to December 29, 1845, citizenship in Texas must have been acquired in one of two ways. First:

> All persons (Africans, the descendants of Africans, and Indians excepted) who were residing in Texas on the day of the Declaration of Independence, shall be considered citizens of the Republic and entitled to all the privileges of such. (Constitution of the Republic of Texas, General Provisions, sec. 10; Hartley's Digest 1850, p. 38.)

And secondly:

> All free white persons who shall emigrate to this Republic and who shall, *after a residence of six months*, make oath before some competent authority that he intends to reside permanently in the same and shall swear to support this constitution, and that he will bear true allegiance to the Republic of Texas, shall be entitled to all the privileges of citizenship. (Idem., p. 37.)

The only provision of the law of Texas relating to citizenship, aside from these two constitutional provisions, was the statute enacted in 1837, which prohibited the appointment of aliens to office. (Laws of the Republic of Texas, 1837, p. 67.)

These laws, defining and limiting citizenship in the Republic of Texas, are exclusive, as are the constitutional and legislative declarations on the same subject in the United States. It can not be contended that citizenship in the Republic of Texas could be acquired in any

other manner than that there provided. Domicile was not sufficient.

Under the constitutional provision, the appellant, an immigrant from one of the German States, could not become a citizen of Texas until after a residence of six months, and then only by a formal act of naturalization. But he arrived in Texas in July, 1845, less than six months before the date when the Republic of Texas ceased to exist. Whatever may have been his intention, that intention could not operate upon his political status until it found expression in accordance with the provisions of law. It never was so expressed, and consequently he never became a citizen of the Republic of Texas.

It is an unwarranted assumption to say that the appellant came to Texas and resided there with the intention of becoming a citizen of the Republic. Texas was then an infant republic, weak in comparison with the great States which bounded her domain on either side; her political future was in doubt. It might well be that the appellant, while embracing the opportunity to better his fortunes by removing his effects and himself to Texas to participate in the prosperity of a growing country, nevertheless preferred to retain his allegiance to his own country and the protection of the German confederation. Instances are not rare, more especially in the case of British subjects, of men who have spent the greater part of their lives in this country without the intention of giving up their status as subjects of the sovereignty under which they were born. Certainly nothing is to be inferred from the fact of five months' residence. When, therefore, the Republic of Texas became a part of the

United States, the appellant was an alien inhabitant, a German subject; he was not a part of the "people of the Republic of Texas," and he no more became a citizen of the United States by the mere act of the annexation of Texas than the tourist within its borders, or the Africans and their descendants, or the Indians, who resided in Texas but were not members of the body politic and had not the status of citizens.

The Louisiana cases (Laverty and Dubois) cited by counsel for appellant are not parallel cases. There the territory belonged to the United States before the States were admitted and the warrant for the decisions is found in the language of the enabling acts creating the States out of such territory. So in the case *Boyd* v. *Thayer*, so far as the opinion in that case, concurred in by only four judges, proceeds on this line of reasoning.

The latter case, however, not only does not sustain the contention of the appellant in this case, but by implication negatives that contention, for the court said (p. 170):

> Admission on an equal footing with the original States * * * involves the adoption, as citizens of the United States, *of those whom Congress makes members of the political community* and *who are recognized as such in the formation of new States with the consent of Congress.*

This, in the case of Boyd, meant his adoption as a citizen of the United States, because, in the admission of Nebraska, the State constitution and the enabling act passed by Congress provided that all persons belonging to the class to which Boyd was held to belong (those

who had declared their intention to become citizens) should be "members of the political community," or, in other words, should be entitled to vote and hold office. It can not be doubted that if the organic law and the enabling act had been silent in regard to the status of persons who had declared their intention of becoming citizens of the United States, Boyd and all others similarly situated would have been obliged to complete their naturalization before they would have been permitted to exercise the rights of citizenship.

If, as appellant contends, residence alone could confer citizenship, no question could have arisen in the case of Boyd, for he had been a resident of the United States almost from birth. If the question of intention and the enjoyment of political rights were conclusive, Boyd could to the have been found to be a citizen without recourse arguments upon which the decision was in fact based, for he had enjoyed all the privileges of a citizen for many years, even to the extent of being elected governor of a State.

CITIZENSHIP NOT ACQUIRED AFTER ANNEXATION.

Contzen was, then, at the date of the admission of Texas not a citizen of that republic or of the United States, but, as said in the clear and concise opinion of the Court of Claims in this case, "a German subject lately arrived in Texas." After that time and up to the date of the depredation in 1861 he did nothing by which his status was changed. He could become a citizen of the United States only by a compliance with the forms provided by statute for that purpose.

It is urged that the appellant had the right of election of citizenship (nationality). This right is now universally admitted. But, as noted on the brief for the appellants (p. 8), "the time, circumstances, and conditions under which this election should be manifested are necessarily regulated by the laws and practice of the adopting, incorporating State." In both the republic of Texas and the United States the laws regulating such an election are explicit, and the appellant did not meet their requirements in either jurisdiction.

If by the appellant's right of election it is meant that he might simply by remaining in the annexed territory become a citizen of the United States, the position is not tenable. Such a course was sufficient, no doubt, in the case of a former citizen of Texas; but the privilege did not extend to tourists, to alien inhabitants, or to other classes of the population. It is to be remembered that there is no room for doubt as to who composed "the people" of Texas; and the appellant was not one of them.

There can be no resort to argument deduced from the law of nations to fix a status when both the fact and form are specifically decreed by positive municipal law. The right of election is not to be exercised solely at the option of the individual. The State has the right to receive or reject him as a citizen. If, as is indicated (though imperfectly) by his continued residence, the appellant had desired to become a citizen of the United States, he could have acquired that status upon making the proper showing as to his character and intentions and taking the proper steps to renounce his former allegiance. This he never did. Whether he decided to

remain a subject of Germany (in which country he afterwards lived, with his family, for a period of seven years), or whether he was not sufficiently interested in the matter to inform himself as to the steps required and complete his naturalization, we do not know, and it is not material.

It is argued that the appellant received "judicial assurance" that he became a citizen of the United States by the annexation of Texas, and that he has since relied upon that assurance. Counsel for the appellees can not admit that this statement is justified by the facts before the court. The agreed statement of facts follows the unsupported testimony of the appellant and means no more than its language conveys. The appellant may have been told that he was a citizen by his counsel, or by a clerk, or by a bystander, and his informant may not have been apprised of the true date of his arrival in Texas, or of the other facts in the case. Of course there was no thought of this alleged statement being considered as a judicial decision of the claimant's citizenship when it was admitted into the statement of facts. Such a decision would have had to be attested by record and would have been conclusive of the question in the court below.

CLASSES OF CITIZENS.

It is urged, however, that there is a class of citizens (*lato sensu*) including all the inhabitants resident in the country who are secure in the enjoyment of civil, personal, and property rights; those who have received the right of perpetual residence, being a kind of citizen of

an inferior order, subject to the society without participating in all its advantages.

If this use of the term "citizen" be admitted in the sense contended for, it still can not be doubted that the members of such a class would be excluded from the provisions of the act of March 3, 1891. The question here is not a question of protection in the rights of property or the exercise of civil or religious liberty. It is a question of the enjoyment of an extraordinary remedy granted by Congress in derogation of the rights of sovereignty and in derogation of the ordinary principles of international law as applied to the Indian tribes and expressly limited in its application to "citizens of the United States." It can not be doubted that the word is there used with its full significance. *Johnson* v. *The United States and the Ute Indians* (160 U. S., 546) is a case in point. The appellant in that case was a claimant under the same act of Congress for a depredation alleged to have been committed in 1866. It was shown that he migrated to the United States in 1848 at the age of 13 years and had been ever since a resident of the United States. His petition was dismissed by the Court of Claims because he was not a citizen of the United States, and the decision was sustained on appeal. The records of the Court of Claims contain many similar cases. There is no argument based on domicile or continuous residence which would not apply with equal force to them all.

The broad distinction between residence, domicile, inhabitancy on the one hand and citizenship on the other is that a necessary element of citizenship is allegiance, while a man may have a domicile in one country and

owe allegiance in another. In *Udny* v. *Udny*, quoted in *United States* v. *Wong Kim Ark* (169 U. S., 656), it is said "the question of naturalization and of allegiance is distinct from that of domicile."

> Nothing short of actual naturalization, carried out by such solemn and formal act as the laws of the particular country require, will have this effect. Domicile, residence preliminary to naturalization, declaration of intention, with renunciation of former allegiance or rights, will not suffice to give the character of citizen or subject of the country of adoption, which can be acquired only by the act of naturalization itself. (Cockburn, Nationality, pp. 135–136; quoted in Morse on Citizenship, p. 85.)

CITIZENSHIP NOT ACQUIRED BY A MINOR.

The nationality of birth can not be changed so long as the individual remains a minor.

> The nationality and the domicile of origin are preserved as long as the child is a minor; for during this period he had not, legally speaking, any will. But as soon as, agreeably to the law of domicile origin, the child obtains the age of majority, he is free to change his nationality and to choose another domicile. (Morse on Citizenship, p. 13.)

On the other hand, the minor children are incapable of expressing their will; neither silence nor election may be imputed to them; for to make a valid election it is necessary to be master of his own rights.

With regard to minors we believe that the principles conceded in regard to ordinary naturalization should apply in cases of annexation. The child follows the status of his father from the time of his

> birth; from that instant he has a nationality which nobody can change without his consent. Silence, as an election on the part of the father, in his name may not be imputed to the child; the father is not master to dispose of the nationality of his son, in case of annexation as in every other circumstance, or at least, in order to clothe him with this right, a special law giving him this power, or an express stipulation in the treaty, would be necessary. (Morse on Citizenship, pp. 147–148.)

The laws of the United States provide for the naturalization of minor immigrants, unaccompanied by their parents, only after they become of legal age.

The appellant was born in 1831 and was 14 years old when Texas was annexed to the United States. He could not have acquired citizenship therefore either in Texas or in the United States. When he became of legal age he was a resident of the United States, and had, as he still has, the option of becoming a citizen by naturalization on making proof of good moral character and satisfying the other requirements of the law.

PRESUMPTIONS NOT IN FAVOR OF APPELLANT.

It is urged that this is a case of peculiar hardship, and that the appellant is entitled to a favorable presumption, since he is a claimant of citizenship. If his claim of citizenship involved only his own rights; if he were claiming protection from political persecution, or asserting a right of participation in government, as in the cases cited on appellant's brief, where in each instance the question arose in a contested election, this principle would no doubt have application. In this case, however, it has no application, for various reasons.

In the first place, this is not a case of doubt to be resolved by the application of liberal rules of construction, but a case for the application of the mandates of plain statutes and recognized principles of law.

In the second place, this is a question of jurisdiction in a suit against the United States, and the statute, being in derogation of sovereignty, must be strictly construed. In the case of *Leighton* v. *The United States*, which arose under the same statute, the court said:

> Before any judgment should be rendered binding the United States, it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate. (161 U. S., 291.)

Again, it is a suit against an Indian tribe for a depredation committed by one or more of its members, the tribe being made a party by the superior power of the United States. In another case, also arising under the same statute, the court said:

> Again, as often affirmed in the decisions of this court, the Indians are in a certain sense the wards of the United States, and the legislation of Congress is to be interpreted as indicated for their benefit. (*Marks* v. *The United States et al.*, 161 U. S., 297.)

Moreover, if the question in this case turned, as argued by the appellant, on the change of domicile, and doubt existed, the presumption would be in favor of the preservation of the original nationality. For this we have so high an authority as the learned counsel for the appellant in this case.

> The legal presumption in favor of the nationality of birth, or of the domicile of origin, continues until proof of change. (Morse on Citizenship, p. 13.)

CONCLUSION.

Independently of the statute law and the constitutional provisions, and waiving the disability of minority, it might be successfully argued that Fritz Contzen was not qualified to acquire citizenship by the transfer of sovereignty from Texas to the United States. His residence had been too short to create a domicile; no other acts, prior to the date of annexation, are shown which would have indicated his intention to acquire a domicile in Texas; on the contrary, the lack of such intention may be inferred from his roving disposition, which carried him, as shown by the petition and the findings, from Germany to Texas, to Arizona, to California, to Germany again for seven years, back to Arizona or Texas, and finally to Arizona; and, although he might have a domicile without being a citizen, it will not be contended that he could acquire citizenship without establishing a domicile.

But, as we have seen, there is in this case no necessity to consider the question whether the appellant's intention was to remain in Texas, whether he had been in Texas long enough to acquire a domicile, or any other doubtful question of fact or law. To quote again the language of the distinguished counsel for the appellant:

> The question of domicile, meaning national domicile, has heretofore entered prominently into all discussions on the subject of citizenship or nationality, and the difficulty of defining domicile has embarrassed inquiry in this connection. *In the light of recent legislation in respect to naturalization by the nations* the discussion as to what does or does not

> constitute domicile must be of less frequent occurrence and importance. But it will remain, in the absence of naturalization, the controlling question wherever citizenship or nationality is claimed or denied on the ground of domiciliation alone. (Morse on Citizenship, p. 93.)

The Republic of Texas was one of the nations whose recent legislation removed all necessity for discussion of domicile as bearing upon citizenship. Naturalization was provided for by the fundamental law of the Republic. In respect to the status of a person who not only had been naturalized, but who did not come within the liberal provisions of the constitution which would have enabled him to apply for naturalization, and who was, therefore, expressly barred by positive law from becoming a citizen, there can be no doubt.

It is submitted that the appellant was, on December 29, 1845, still a subject of the German confederation, and of the German State from which he emigrated; that he had not become and could not have become a citizen of the Republic of Texas; that as a German subject he was not in a position to be affected by the collective naturalization of the people of Texas when that Republic became a part of the United States; and that the holding of the court below was without error, and should be affirmed.

JOHN G. THOMPSON,
Assistant Attorney-General.

LINCOLN B. SMITH,
Assistant Attorney.

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Supreme Court of the United States.

No. 84—October Term, 1900.

Fritz Contzen, Appellant,
vs.
The United States and the Apache Indians. } Appeal from the Court of Claims.

[December 3, 1900.]

Appellant filed his petition in the Court of Claims, alleging that on October 20, 1861, a band of Apache Indians raided the settlement at San Xavier, near Tucson, Arizona Territory, and stole from his ranch certain cows, horses and mules of the value of $10,330; that these Indians were in amity and under treaty relations with the United States at that date; and "that petitioner is a naturalized citizen of the United States, and has at all times borne true allegiance to the Government of the United States," &c.

The United States pleaded that the claimant was not a citizen of the United States at the date of the alleged depredation, and that the court was therefore without jurisdiction to hear and determine the cause.

The court adopted as its findings of fact the following agreed statement of facts:

"The claimant, Fritz Contzen, was born in Germany on the 27th day of February, 1831, and emigrated to Texas in July, 1845. He remained in Texas until the admission of the State into the Union, December 29, 1845.

"Since the admission of Texas, the claimant has resided continuously in the United States, mostly in Arizona and some time in California. He visited Germany with his wife and child from 1873 to 1880, his home and furniture remaining all the time in this country. He was married in the United States. His residence was in Texas until he came to Arizona, in 1855, with Major Emory, on the boundary commission.

"In the year 1854 he went into court at San Antonio, Texas, and he was told that he being a resident of Texas when it became part of the United States, that made him a citizen of the United States, and he voted there. He never took any further steps about naturalization. There is no record of naturalization from 1847 on of any one of the claimant's name, when such record should appear in the courts of San Antonio.

"That in October, 1861, the defendant Indians were in amity with the United States."

Judgment was thereupon given sustaining defendants' plea to the jurisdiction, and dismissing the petition. 33 Ct. of Cl. 475.

Mr. Chief Justice Fuller delivered the opinion of the Court:

The petition alleged that appellant was a naturalized citizen of the United States at the time it was filed, but it contained no averment that

he was such citizen at the date of the alleged depredation. If he was not, the Court of Claims did not have jurisdiction to adjudicate upon his claim, and its judgment must be affirmed. *Johnson* v. *United States*, 160 U. S. 546.

It appeared that Contzen was born in Germany, February 27, 1831, and came to Texas in July, 1845, and that he was not naturalized under the statutes of the United States in that behalf prior to October 20, 1861. His title to citizenship at that time is asserted on the ground that he was embraced by a collective naturalization effected by the admission of Texas into the Union.

It is not disputed that citizenship may spring from collective naturalization by treaty or statute, nor that by the annexation of Texas and its admission into the Union all the citizens of the former republic became, without any express declaration, citizens of the United States.

And the first question is whether Contzen was a citizen of the republic when it became a State.

The Declaration of Independence of Texas was adopted March 1, and proclaimed March 2, 1836, and the constitution of that Republic was ordained March 17 of that year.

Section six of the "General Provisions" of that instrument read: "All free white persons who shall emigrate to this Republic, and who shall, after a residence of six months, make oath before some competent authority that he intends to reside permanently in the same, and shall swear to support this constitution, and that he will bear true allegiance to the Republic of Texas, shall be entitled to all the privileges of citizenship."

By section ten it was provided that: "All persons (Africans, or descendants of Africans, and Indians excepted) who were residing in Texas on the day of the declaration of independence, shall be considered citizens of the Republic and entitled to all the privileges of such." 2 Charters and Constitutions, 1760.

The fundamental law of the Republic thus identified as citizens only such persons as were residing in Texas on the day of the declaration of independence or should be naturalized according to its provisions.

Section 10 also provided that: "No alien shall hold land in Texas except by titles emanating directly from the government of this republic;" and by an act of 1837, appointments of aliens to military office were forbidden. Laws Rep. Texas, vol. 2, p. 61.

Aliens as well as Africans and Indians were recognized constituents of the population.

March 1, 1845, a joint resolution for the annexation of Texas was approved, which provided that the territory of that Republic might be erected into a new State, "with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with

the consent of the existing government, in order that the same may be admitted as one of the States of this Union." The government of Texas thereupon consented to annexation, and a convention was called to sit at Austin on July 4, 1845, for the adoption of a constitution for the proposed State. That convention assented to and accepted the resolution of Congress, and framed a constitution, which was submitted to and ratified by the people, October 13, 1845.

The joint resolution for the admission of Texas into the Union was approved December 29, 1845. This recited the previous proceedings, and that the constitution, "with the proper evidence of its adoption by the people of the Republic of Texas," had been transmitted to the President of the United States and laid before Congress. An act of Congress was passed on the same day, December 29, 1845, by which the laws of the United States were "declared to extend to and over, and to have full force and effect within, the State of Texas, admitted at the present session of Congress into the Confederacy and Union of the United States." 2 Charters and Constitutions, 1764, 1765, 1768, 1783; 5 Stat. 797; 9 Stat. 1, 108.

Contzen was a minor in 1845, and his nationality of origin attached. He did not reside in Texas on the day of the declaration of independence; he had not resided there six months at the date of the admission of Texas into the Union; he had not taken the oath of allegiance to the Republic; he was simply, as Davis, J., delivering the opinion of the Court of Claims, said, "a German subject lately arrived in Texas." Clearly he was not a citizen of Texas when the State was admitted.

But it is contended that by his stay in Texas of less than six months Contzen became one of the people of Texas; that the people were admitted into the Union; and that all who were competent thereupon became citizens of the United States. In other words, that the effect of the proceedings through which annexation and admission were accomplished was not simply to collectively make citizens of the United States of all the then citizens of Texas, but to collectively naturalize all who might have been naturalized in Texas, but had not been, and had in no way signified their election to become citizens of the United States. And that this included alien minors independently of their parents.

We cannot concur in this view, and do not think such was the intention of Congress or of the people applying for admission.

Texas occupied towards the United States the position of an independent sovereignty. Its citizens were determined by its laws, and they prescribed the manner in which aliens might become citizens.

The United States admitted Texas as one of the States of the Union with its population as it stood. Those who were citizens of the State became citizens of the United States, while aliens were relegated for naturalization to the laws of the United States on that subject.

It is true that section two of article three of the State Constitution, transmitted to Congress in the process of admission, provided that: "All free male persons over the age of twenty-one years, (Indians not taxed, Africans and descendants of Africans excepted,) who shall have resided six months in Texas, immediately preceding the acceptance of this constitution by the Congress of the United States, shall be deemed qualified electors."

But we need not consider the effect of that clause, as Contzen did not come within it.

The subject of collective naturalization is discussed at length in *Boyd* v. *Thayer*, 143 U. S. 135, and many cases cited and illustrations given. The case before us, however, is not one of a treaty of cession, or relating to a territory of the United States and involving the construction of acts of Congress for its government, or of enabling acts for its admission.

Contzen, as we have said, was a minor at the time Texas was admitted. If he elected, when he attained his majority, to become a citizen of the United States, the way was open to him.

By the act of May 26, 1824, carried forward into section 2167 of the Revised Statutes, special provision was made for the naturalization of alien minor residents on attaining majority, by dispensing with the previous declaration of intention, and allowing three years of minority on the five years' residence required; but he was obliged, at the time of his admission, to take the oath to support the Constitution, and of renunciation of all allegiance and fidelity to any foreign sovereign, in court, and also to declare on oath and prove to the satisfaction of the court that for two years next preceding it had been his *bona fide* intention to become a citizen of the United States; and in all other respects to comply with the laws in regard to naturalization.

The usual proof of naturalization is a copy of the record of the court admitting the applicant, though, in some instances, there may be facts from which, in the absence of the record, a jury may be allowed to infer that a person, having the requisite qualifications to become a citizen, had been duly naturalized. But the finding of facts in this case excludes any presumption that Contzen had complied with the statute prior to October, 1861.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.